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In the

Supreme Court of the United States

October Term, 1940.

No. 35.

KANSAS CITY, MISSOURI, a Municipal Corporation,
Petitioner,

vs.

L. SINGER & SONS ET AL., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF RESPONDENT UNION PACIFIC RAILROAD COMPANY.

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INDEX.

PAGE

The opinions below 1

Jurisdiction 2

The statutes involved 3

Statement of the case 4

Nature of the case 4

The motion to intervene 5

Petitioner's intervening petition 7

Respondent's contentions respecting the motion 8

Summary of the argument 10

Argument 11

Petitioner has no unconditional or permissive right of intervention and the order denying intervention is not appealable 11

(A) The right of intervention 11

(B) The order of the District Court denying petitioner's motion to intervene is not appealable 15

The allegations of the motion and the complaint affirmatively disclose that petitioner has no right to intervene under paragraphs 18 to 20 in this action 16

Petitioner has no legal right to redress alleged private wrongs done its citizens 19

Petitioner has no right to intervene because of its desire to protect the public interest 26

The cases cited by petitioner do not disclose the existence of any legal right 28

Liberal construction of the statute contended for by petitioner 31

Conclusion 33

Appendix 37

PAGE

Cases Cited.

Alabama Power Company v. Ickes, 302 U. S. 464.....19

Atchison, Etc., Ry. Co. v. Railroad Commission of California, 283 U. S. 380.....29

Botany Mills v United States, 278 U. S. 282, 289.....27

Carolina Power & Light Co. v. South Carolina Public Service Authority, 94 F. (2d) 520.....19

Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382.....28

Credits Commutation Co. v. United States, 177 U. S. 311.....15

Cutting, *Ex parte*, 94 U. S. 14.....15

Edward Hines Yellow Pine Trustees v. United States, 263 U. S. 143.....19, 31, 34

Engelhard *In re*, 231 U. S. 646.....15

Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578.....15

Frey & Son v. Cudahy Packing Co., 256 U. S. 208.....16

General Utilities & Operating Co. v. Helvering, 296 U. S. 200.....16

Georgetown v. Alexandria Canal Co., 37 U. S. 91, 99.....22

Guion v. Liverpool, London & Globe Ins. Co., 109 U. S. 173.....15

Helvering v. Gowran, 302 U. S. 238.....16

Helvering v. Rankin, 295 U. S. 123.....16

Instant Case, in Circuit Court of Appeals and District Court, 109 F. (2d) 493; 26 F. Supp. 721.....1, 4, 8

INDEX—Continued.

PAGE

International News Service v. Associated Press, 248 U. S. 215 30

Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry. Co., 218 U. S. 88, 109 23

KVOS, Inc. v. Associated Press, 299 U. S. 269 30

Langnes v. Green, 282 U. S. 531 16

New York City v. New York Telephone Co., 261 U. S. 312 15

Railroad v. Ellerman, 105 U. S. 166 19

Smiley v. Kansas, 196 U. S. 447, 457 23

St. Louis & San Francisco R. Co. v. Brown, 241 U. S. 223 16

State of Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co., 220 U. S. 277, 286-7 ..... 20, 25

Stelos Co. v. Hosiery Motor-Mend Corp., 295 U. S. 237 16

Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118 19

Town of Inlet v. New York Central R. R. Co., 7 F. Supp. 781 30

U. S. v. American Railway Express Co., 265 U. S. 425 16

U. S. v. Holt State Bank, 270 U. S. 49 16

United States v. Smelser, 87 F. (2d) 799, 801 21

U. S. v. Williams, 278 U. S. 255 16

West Tennessee Power & Light Co. v. City of Jackson, 97 F. (2d) 979 19

Western Pacific v. Southern Pacific Co., 284 U. S. 47 28

PAGE

Statutes Cited.

Interstate Commerce Act (Transportation Act 1920; Title 49, U. S. C. A.):

Section 1, paragraph 18.....3, 4, 8, 9, 10, 11, 12, 14, 16, 18, 20, 22, 25, 26, 27, 28, 29, 30, 33, 34, 37

Section 1, paragraph 19.....32

Section 1, paragraph 20....3, 4, 5, 8, 9, 10, 11, 12, 14, 16, 18, 20, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37

Interstate Commerce Act (in Judicial Code, Title 28, U. S. C. A.):

Section 45a 30, 31

Judicial Code (Title 28, U. S. C. A.):

Section 45a of Title 28, U. S. C. A.....30, 31

Sections 212-213 of Judicial Code.....30, 31

Section 225 of Title 28, U. S. C. A.....15

Section 240(a) of Judicial Code (28 U. S. C. A. 347).. 2

Rules Cited.

Rules of Civil Procedure

Rule 24, paragraph (a).....11, 13

Rule 24, paragraph (b).....13, 14

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BRIEF OF RESPONDENT UNION PACIFIC RAILROAD COMPANY.

I.

THE OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit appears in the record beginning at page 33 and is reported in 109 F. (2d) 493. The opinion of the District Court for the Western District of Missouri appears in the record at page 25 and is reported in 26 F. Supp. 721.

II.

JURISDICTION.

This cause is before this Court upon a writ of certiorari issued by this Court to the United States Circuit Court of Appeals for the Eighth Circuit, under authority of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1939 (C. 229, 43 Stat. 936, 28 U. S. C. A., 347).

III.

THE STATUTES INVOLVED.

Petitioner asserts its right to intervene under paragraph 20, Section 1 of the Transportation Act 1920 (41 Stat., Section 478, 49 U. S. C. A., paragraph 20, Section 1) authorizes

> "the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; * * *."

to invoke the remedy by injunction conferred by this section to enjoin a violation of paragraph 18, Section 1 of the Transportation Act 1920 (49 U. S. C. A., §1, par. 18) which, among other things, prohibits a carrier by railroad from extending its line of railroad without first securing a certificate of convenience and necessity from the Interstate Commerce Commission. A full copy of the paragraphs in question is set forth in the appendix to this brief.

IV.

STATEMENT OF THE CASE.

Nature of the Case.

L. Singer & Sons, and others, who are produce commission merchants doing business on the Kansas City, Missouri, market, and others who own property at that market, brought suit in the District Court of the United States for the Western District of Missouri, against the Union Pacific Railroad Company, under paragraphs 18 to 20, Section 1 of the Transportation Act 1920 (49 U. S. C. A., paragraphs 18 to 20, Section 1) to enjoin the construction of an alleged extension to its railroad asserted to be built to serve a food market built by the City of Kansas City, Kansas, in that city. That case is upon the docket of this Court as No. 34. Petitioner herein, asserting a right to intervene in that case under paragraphs 18 and 20 of Section 1 of the Act, filed a motion to intervene in that case, to which its intervening petition was attached. The District Court denied petitioner's motion to intervene (R. 22-23; 26 F. Supp. 721) and the Circuit Court of Appeals, in a separate appeal taken by petitioner from the order denying intervention, affirmed (R. 33, 40, 45-47; 109 F. [2d] 493). The question presented for decision in this case is whether petitioner has an unconditional right or a permissive right to intervene in this action under any statute and whether petitioner is a "party in interest" who may intervene on the grounds asserted in the motion and the intervening petition attached thereto.

Inasmuch as petitioner in this case has included in its intervening petition all of the allegations of the com-

plaint in Case No. 34, in which the motion to intervene was filed, this respondent's brief in this case will be confined to argument that the grounds presented in the motion to intervene and the supplementary allegations of the intervening petition are insufficient. Petitioner's brief in this case, insofar as the argument invokes the allegations of the complaint and the argument of petitioners in Case No. 34, has been fully answered by respondent in that case and will not be repeated here, to avoid needless repetition. Petitioner in this case has been served with a copy of respondent's brief in Case No. 34 so that its counsel may be fully advised.

The Motion to Intervene.

Petitioner asserted in its motion to intervene that paragraph 20 of Section 1 of the Transportation Act 1920 conferred upon it the unconditi al right to intervene in this action because of the interest of petitioner set forth in paragraphs 5 (a) to 5 (h) of its motion (R. 9). These grounds are:

(a) That a petition was filed with petitioner's City Manager on January 9, 1939, by 41 produce merchants, property owners and businessmen, requesting that petitioner intervene in the case, in pursuance of which a resolution was adopted by petitioner's council authorizing it to intervene and to file such pleadings as it may deem necessary;

(b) On May 26, 1931, the people of Kansas City, Missouri, voted one-half million dollars to be used in the construction of a new wholesale and retail market which is now under construction;

(c) For 75 years there has been built up a large volume of business and a great number of merchants engaged in

buying and selling fruits, vegetables and other food products at wholesale and retail around the City Market, and that there are a great number of firms engaged in businesses connected with and having a direct relation to the business of said market; that the wholesale and retail produce merchants and other firms have invested in real estate, buildings and improvements; that the market has been equipped for years with more than adequate rail and transportation service, storage facilities, loading docks, team tracks and other appurtenances necessary to a marketing center having a large urban population; that said market is serving numerous adjacent territories to Kansas City in the State of Missouri; that said market is accessible to all portions of the surrounding territory by hard-surfaced roads and steam and electric transportation; and that such facilities have been more than adequate to supply the demand and such will be the case for years to come;

(d) That it is the proposed plan and scheme of respondent, Union Pacific Railroad Company, to promote the erection of a competing market center in Kansas City, Kansas, and to build the necessary extension of its lines to serve the same, whereby it will be enabled to control the operation of the market and divert revenues from Kansas City, Missouri, and from the persons engaged in said wholesale and retail produce business and its complementary industries, and that there will thereby accrue to respondent a large amount of freight and other revenue which will be diverted from the territory in Kansas City, Missouri;

(e) That the persons engaged in the produce business and otherwise pay large amounts in real estate, personal and occupation taxes, and if respondent is permitted to proceed with the promotion of the Kansas City, Kansas,

market without obtaining a certificate of convenience and necessity from the Interstate Commerce Commission, Kansas City, Missouri, will be in danger of losing a large amount of revenue from the payment of taxes, due to the fact that many of the produce merchants will remove from Kansas City, Missouri, and carry on their business in said competing center;

(f) That all of the aforesaid reasons (a to e), inclusive, constitute questions of law and fact in common with petitioner's interest and the cause of action set forth in the complaint of L. Singer & Sons *et al.*;

(g) That the representation of petitioner's interest by L. Singer & Sons for the foregoing reasons is inadequate and as to the right of respondent to construct said extensions, a judgment in this action would be binding upon petitioner, there being no public or *quasi* public party with any interest in the subject matter which could adequately represent Kansas City, Missouri, as a party to this suit;

(h) That the foregoing statements show the need of petitioner "to intervene to protect the public interests of its residents and in order that the process of this Court will not unduly prejudice their interest." (R. 7-9).

Petitioner's Intervening Petition.

Attached to and forming a part of petitioner's motion to intervene was its intervening petition (R. 11-18), the first 11 paragraphs of which (R. 11-17) are in all substantial particulars identical with the allegations of the main complaint, which is before this Court in Case No. 34, which have been analyzed in our brief in that case and, for that reason, as hereinbefore stated, we believe need not be repeated here. We will, therefore, consider in

this statement the supplementary matter which petitioner has injected in its intervening petition.

In paragraph 12 (R. 17-18) it is alleged that neither the Interstate Commerce Commission nor the State of Missouri, nor any Commission or Board of the State of Kansas, or of the State of Missouri, has instituted any proceeding to secure the relief sought in this action, and that therefore petitioner brings this suit. It alleges further that it brings this suit on its own behalf and on behalf of all the citizens and taxpayers in Kansas City, Missouri, who have a common and general interest in this proceeding. It is apparently petitioner's theory that because the United States, the Interstate Commerce Commission, and the duly authorized regulatory bodies of the States of Missouri and Kansas, have brought no proceeding, that petitioner is therefore authorized to bring such proceeding in behalf of its citizens.

Respondent's Contentions Respecting the Motion.

In the argument before both the District Court, in which the motion was denied (26 F. Supp. 721), and in the Circuit Court of Appeals, where the District Court's ruling on petitioner's separate appeal from the order denying intervention was affirmed (109 F. [2d] 493), respondent contended that the motion should be denied for the following reasons:

1. No intervention, either as a matter of right or permissibly, could be invoked by petitioner under paragraphs 18 to 20 of Section 1 of the Act, because these paragraphs (a) grant no unconditional right of intervention and (b) assuming permissive intervention is proper, the granting or denial of such intervention is a matter of discretion not reviewable in this case.

2. That the petitioner is not authorized by paragraphs 18 and 20 of Section 1 of the Transportation Act to intervene so far as the public interest may be concerned, because that right is conferred by the paragraphs solely on the United States and the governmental agencies therein specified, of which petitioner is not one of those designated;

3. That petitioner has no right to intervene to redress alleged private wrongs done to its citizens and that none of its legal rights have been invaded by respondent;

4. That if petitioner's complaint is the damage to the business and property of the petitioners in Case No. 34 before this Court, petitioner has no legal interest because not only is it one step farther removed than the petitioners in Case No. 34, but also in such case the petitioner would not be a party in interest who could complain of a competing market, for the reasons pointed out in respondent's brief in Case No. 34;

SUMMARY OF THE ARGUMENT.

1. Petitioner has no unconditional or permissive right of intervention and the order denying intervention is not appealable.

A. The right of intervention.

B. The order of the District Court denying petitioner's motion to intervene is not appealable.

2. The allegations of the motion and the complaint affirmatively disclose that petitioner has no right to intervene under paragraphs 18 to 20 in this action.

3. Petitioner has no legal right to redress alleged private wrongs done its citizens.

4. Petitioner has no right to intervene because of its desire to protect the public interest.

5. The cases cited by petitioner do not disclose the existence of any legal right.

6. Liberal construction of the statute contended for by petitioner.

ARGUMENT.

Petitioner has no unconditional or permissive right of intervention and the order denying intervention is not appealable.

A. The right of intervention.

Petitioner asserts in point I of its brief that it has the right to intervene in and maintain the action. Inasmuch as petitioner did not institute the action initially and sought only to intervene, the only question for decision in this case is whether petitioner may intervene in the action, which was brought under paragraphs 18 and 20 of Section 1 of the Act.

Rule 24 of the Rules of Civil Procedure govern the right of intervention. Paragraph (a) of that rule, dealing with intervention as of right, provides:

> "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."

Neither paragraphs 18 or 20 of Section 1 confer any right of intervention, paragraph 18 providing that no carrier by railroad shall extend its line of railroad without securing a certificate of convenience and necessity from the Commission, and paragraph 20 giving certain regulatory agencies and any party in interest the right

to enjoin any construction in violation of paragraph 18. Hence, neither paragraphs 18 nor 20 confer any right to intervene and there is no other federal statute that confers such right. Therefore, petitioner does not come within the first subdivision of paragraph (a) of Rule 24.

Petitioner was free to file its petition as the first pleading in an independent suit. Any action which it might assert against respondent, under paragraphs 18 or 20, was neither lost nor prejudiced by the order of the Court denying the motion of petitioner to intervene.

No legal reason is pointed out in the motion to intervene why the representation by the produce commission merchants in the Singer case, No. 34, is inadequate. In fact, the allegations of the motion refute any idea of inadequacy, as will be noticed by an examination of the grounds of inadequacy therein stated. In its motion, petitioner alleged (a) that the representation of petitioner's interest by L. Singer & Sons *et al.*, is inadequate and because there is no public or *quasi* public body with any interest in the subject matter which could adequately represent petitioner as a party in this suit, petitioner should intervene; (b) that it is necessary for petitioner "to intervene to protect the public interest of its residents and in order that the process of the Court will not unduly prejudice their interest" (R. 6, 9).

Petitioner is not one of the public agencies designated by paragraph 20 to protect the public interest. That interest may be protected only by the agencies therein designated. The paragraph contains no provision that a city or any political subdivision of a state may institute an action under paragraph 20 if the agencies therein designated fail or refuse to institute such action. Therefore, ground (1), as stated in the motion, presents no legal reason why the representation by existing parties

is or may be inadequate insofar as petitioner is concerned.

The language of the statute precludes any right to intervention on the second ground, as above stated, where it is asserted petitioner seeks to intervene to protect the public interests of its residents and in order that the process of this Court will not unduly prejudice their interests. As to this claimed ground of intervention, again the answer is the language of paragraph 20 which does not authorize the petitioner to act to protect the interests of its residents. As stated before, only the public agencies designated therein are authorized to act.

Furthermore, inadequacy of representation gives no right to intervene unless the proposed intervener will be bound by the judgment in the pending suit. There is no privity between the original plaintiffs and Kansas City, Missouri. A judgment against the original plaintiffs would not bar the prosecution of a suit by the City. It follows that petitioner has no right to intervene under the second ground named in the rule.

Inasmuch as there is no property in the custody of the Court or of an officer thereof, concerning which petitioner is to be affected by a distribution thereof, petitioner does not come within the third subdivision of paragraph (a) of Rule 24. Therefore, we submit that it is made plain that petitioner does not have the unconditional right to intervene under paragraph (a) of Rule 24.

It is clear that petitioner is not entitled, as a matter of right, to a permissive intervention as prescribed by paragraph (b) of Rule 24 which provides:

> "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense in the main action have a question of fact

or law in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

As to the first subdivision of paragraph (b), it is plain that no permissive right of intervention exists, because no statute of the United States, on which petitioner bases its right to intervene, confers a conditional right therefor. Neither paragraphs 18 nor 20 confer any right to intervene, so that petitioner may not rely on subdivision (1) of paragraph (b) of the Rule.

The matter of allowing permissive intervention under paragraph (b) of the Rule is discretionary. In exercising its discretion, the Court will consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. That means that in exercising its discretion the Court will give such a situation consideration. It constitutes no limitation on the power of the Court to otherwise exercise its discretion. The Court might very well consider the effect of delay and prejudice to the lawsuit, but in the exercise of its discretion, on other grounds, deny the motion to intervene, and the exercise of such discretion will not be considered by an appellate court.

In the District Court, the sufficiency of the complaint was heard and determined before consideration was given to petitioner's motion. When the District Court held that the complaint was insufficient, it denied petitioner's motion to intervene, which covered the grounds asserted therein and in the intervening petition, to which we will direct attention at pages 16 to 18, *infra*, in this brief. In such situation, it is respectfully submitted that petitioner is not entitled, as a matter of right, to permissive intervention under paragraph (b) of Rule 24.

B. The order of the District Court denying petitioner's motion to intervene is not appealable.

It has been pointed out that the District Court had the power, in the exercise of its discretion, to permit petitioner to intervene. It is, therefore, clear that the refusal of the Court to permit intervention was a pure exercise of discretion which did not adjudicate any of the petitioner's rights and that the order of the Court was not a final order. Any right which petitioner might have had against the respondent was neither lost nor prejudiced by the order denying intervention. For these reasons it has been held that no appeal will lie from an order of a Federal District Court refusing leave to intervene in a suit instituted by others where the right of intervention is merely permissive.

Credits Commutation Co. v. *United States*, 177 U. S. 311;
Guion v. *Liverpool, London & Globe Ins. Co.*, 109 U. S. 173;
New York City v. *New York Telephone Co.*, 261 U. S. 312;
Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578;
In re Engelhard, 231 U. S. 646;
Ex parte Cutting, 94 U. S. 14.

Section 225 of Title 28, U. S. C. A., provides that:

> "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

This statute only authorizes an appeal when the judgment is final. It follows that petitioner was not entitled to appeal from the order of the District Court refusing

intervention. The Circuit Court of Appeals had no jurisdiction to reverse the order complained of by petitioner and that court did not do so. Therefore, the reasons given for allowing the order to stand are immaterial because the result was right. When the Court decides a case correctly but assigns the wrong reason therefor, the decision must stand.

St. Louis & San Francisco R. Co. v. *Brown,* 241 U. S. 223;
Helvering v. *Gowran,* 302 U. S. 238;
Frey & Son v. *Cudahy Packing Co.,* 256 U. S. 208;
U. S. v. *American Railway Express Co.,* 265 U. S. 425;
U. S. v. *Holt State Bank,* 270 U. S. 49;
Langnes v. *Green,* 282 U. S. 531;
Stelos Co. v. *Hosiery Motor-Mend Corp.,* 295 U. S. 237;
U. S. v. *Williams,* 278 U. S. 255;
Helvering v. *Rankin,* 295 U. S. 123;
General Utilities & Operating Co. v. *Helvering,* 296 U. S. 200.

It is submitted that petitioner having taken a separate appeal from the order denying intervention has no standing in this Court to challenge that ruling in the courts below because that order was not final, was not appealable and is therefore not subject to review in this case.

The allegations of the motion and the complaint affirmatively disclose that petitioner has no right to intervene under paragraphs 18 to 20 in this action.

Petitioner predicates its right to intervene under paragraphs 18 and 20, Section 1 of the Transportation Act 1920 upon the following grounds, alleged in its motion, which may be summarily stated:

1. That its City Council authorized it to intervene;

2. That its citizens had voted $500,000.00 in bonds to construct a new market, which it is now constructing;

3. That for 75 years a large volume of business in the purchase and sale of fruits, vegetables and other food products has been built up for the market; "that the market has been equipped for years with more than adequate rail and transportation service; and that such facilities have been more than adequate to supply the demand, and such will be the case for years to come";

4. That it is the plan and scheme of respondent to promote the erection of a competing market in Kansas City, Kansas, and to build the necessary extention of its lines to serve the same and thereby control the operation of the market and divert revenues from Kansas City, Missouri, and from the persons engaged in the produce business and complementary industries, and thereby respondent will receive a large amount of freight and other revenue which will be diverted from the territory in Kansas City, Missouri;

5. That the persons engaged in the produce business pay large amounts in real estate, personal and occupation taxes, and if respondent constructs the alleged extension, then petitioner will be deprived of those revenues because of the removal of the produce merchants now transacting business in the Kansas City market.

Two other grounds charging that it was petitioner's duty to protect the public interest will be discussed in the second subdivision of the argument immediately following.

And, in addition, petitioner asserted the same general grounds for relief alleged in the complaint of L. Singer & Sons, which have been analyzed and argued by this respondent in its brief filed by it in Case No. 34, on the

docket of this Court. The repetition here of that analysis and argument is omitted because as hereinbefore stated the Court has the matter before it in that case and a copy of respondent's brief in that case has been served upon petitioner in this case.

That petitioner's City Council had authorized it to intervene and that the citizens of petitioner had voted $500,000.00 in bonds to construct a new market, which it was now building (1) and (2), *supra,* are no legal reasons why petitioner should be authorized to intervene in this proceeding and need not be further noticed.

Likewise, the ground asserted in (3), *supra,* that for 75 years a large volume of produce business has been built up at the Kansas City market by a large number of firms engaged in business there and the market has been equipped for years "with more than adequate rail and transportation service, storage facilities, loading docks and team tracks, and that such facilities have been more than adequate to supply the demand and such will be the case for many years to come" likewise presents no grounds for intervention in this action by petitioner. This ground, as asserted by petitioner, refutes completely the idea that petitioner has sustained any legal damage, even assuming, *arguendo,* that it may assert legal damage by intervention under paragraphs 18 to 20 of Section 1, because it affirmatively states that the transportation facilities are more than adequate to serve its market now and for many years to come.

The other grounds of intervention will be separately discussed in the argument following.

Petitioner has no legal right to redress alleged private wrongs done its citizens.

In "4," *supra,* petitioner charges that in promoting the erection of a competing market in Kansas City, Kansas, and building the alleged extention of its railroad to serve the same, respondent will thereby divert revenues from the persons engaged in the wholesale and retail business and its complementary industries and that there will thereby accrue to respondent large amounts of revenue from freight and other sources which will be diverted from the Kansas City, Missouri, territory. Thus, petitioner contends that it is entitled to intervene on the ground that produce commission merchants and others engaged in complementary industries on the Kansas City, Missouri, market will suffer loss and damage because of the competition which will be caused to them by the Kansas City, Kansas, market. If, as we have demonstrated in our brief in *Singer & Sons* v. *Union Pacific Railroad Company,* Case No. 34, the produce commission merchants do not have the right to be free from competition (resp. brief, Case No. 34, pp. 10-16), then, certainly, petitioner may not maintain an action in behalf of its citizens to assert rights which they do not possess.

See:

Alabama Power Company v. *Ickes,* 302 U. S. 464;
Edward Hines Yellow Pine Trustees v. *United States,* 263 U. S. 143;
Tennessee Electric Power Co. v. *Tennessee Valley Authority,* 306 U. S. 118;
Railroad v. *Ellerman,* 105 U. S. 166;
Carolina Power & Light Co. v. *South Carolina Public Service Authority,* 94 F. (2d) 520 (C. C. A. 4);
West Tennessee Power & Light Co. v. *City of Jackson,* 97 F. (2d) 979 (C. C. A. 6).

Petitioner, being one step farther removed than are the petitioners in Case No. 34, would certainly possess no greater rights than those of the petitioners in that case. The petitioners in Case No. 34 having no right to be free from competition and consequently no right to maintain this action under paragraphs 18 to 20, the petitioner in this case obviously could not intervene.

But even though it be assumed, *arguendo*, that the commission merchants sustained legal injury, nevertheless, petitioner is not a party which can intervene in that action in behalf of those who claim injury. Petitioner is not authorized to maintain a suit to redress grievances concerning the property or legal rights of its citizens. This Court so held in *State of Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 220 U. S. 277, wherein the State of Oklahoma, acting in behalf of the citizens of the state who were shippers, brought an action against the railroad to restrain it from charging unreasonable rates within the state. This Court said, l. c. 286-7:

> "In the present case, the State seeks to enjoin the defendant company from charging more than the Kansas rates on the transportation of lime, cement, plaster, brick, stone, crude and refined oil. But the State, as such, in its governmental capacity, is not engaged in their sale or transportation, and has no property interest in such commodities. It seeks only, as between the railway company and shippers, by a general, comprehensive decree to enforce certain rates and to compel the railway company to respect the rights of *all* of the people of Oklahoma who may have occasion to ship such commodities over the railway."

This Court held that the State could not maintain the action in behalf of its citizens who had sustained legal injury.

The principle is further illustrated in *United States* v. *Smelser,* (C. C. A. 5) 87 F. (2d) 799, where suit was brought by the United States against a former referee in bankruptcy to recover multiple excessive fees paid to him from the funds of numerous estates. The suit was not based upon the bond which the referee had given. In both the District Court and the Circuit Court of Appeals, the allegation that the fees had been illegally paid to the referee was treated as admitted. Obviously, the parties who had been damaged by the alleged illegal exactions were the creditors of the estates whose assets were used for their payment. The question presented and decided was whether the United States had the right to maintain the action. In holding that the United States could not maintain the action, the Court said, l. c. 801:

> "To entitle a plaintiff to judgment, something more than a legal cause of action must exist; the right to maintain it must be in the person instituting the suit. In *United States* v. *Brainerd* (D. C.) 250 F. 1011, 1012, 1015, the court held that 'the sovereign in its representative capacity has no implied power to demand a general accounting for the purpose of impounding funds collected in excess of that by law allowed for the benefit of individuals entitled thereto, because the state, through its public officials, should not so assist either party in a private controversy.'"

It seems too plain for argument that neither a city nor a state, nor any political subdivison thereof, could lawfully assume either the prosecution or defense of actions involving redress for private wrongs done to or by its citizens. There are, of course, situations where statutes require actions involving private wrongs to be brought in the name of the sovereign for the use and benefit

of the party aggrieved. Such statutes, however, are nothing more than a procedural scheme which have for their purpose the prevention of a multiplicity of suits, such as federal statutes requiring a suit in the name of the United States against a contractor on a bond given by him to secure the faithful performance of a contract. But the authority in all such cases is of express statutory origin. Without it, the authority in the sovereign does not exist. Petitioner points to no statute conferring such authority. Its only claim to intervene is based upon paragraphs 18 to 20, which do not confer upon petitioner the right to maintain actions to redress alleged private wrongs of its citizens.

In the early case of *Georgetown* v. *Alexandria Canal Co.*, 37 U. S. 91, this principle was applied. That was a suit by the City of Georgetown on behalf of itself and its citizens, against the Canal Company, to enjoin the latter from constructing an aqueduct across the Potomac River within the limits of the city. It was alleged that the canal was a public highway which could be freely used by its citizens and that the construction of the aqueduct would interfere with such use. This Court said, l. c. 99:

> "With this principle as our guide, let us now examine the pretensions of the appellants in this case. Who are they? Not, indeed, a private person, but a corporation. They profess to come into court for themselves and for the citizens of Georgetown. Now, it is not even pretended, that in their character of a corporation only, they have any power or authority given to them by their charter, to take care of, protect and vindicate in a court of justice, the rights of the citizens of the town, in the enjoyment of their property, or in removing or preventing any annoyance to it. * * * The complainants,

> then, must, as in the case of private persons, to maintain their position in a court of equity for relief against a public nuisance, have averred and proved, that they were the owners of property liable to be affected by the nuisance, and that, in point of fact, were so affected, so as that they thereby had suffered a special damage. Now, there is no such averment in this bill. The appellants seem to have proceeded on the idea, that it appertained to them, as the corporate authority in Georgetown, to take care of and protect the interests of the citizens. In this idea, we think they were in error; and that they cannot, upon any principle of law, be recognized as parties competent in court to represent the interests of the citizens of Georgetown."

If legal injury has been done to petitioner's citizens, then the grievance is that of the citizens who have sustained legal injury and not that of petitioner. This Court, in *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, applied the applicable principle, l. c. 109, when it said:

> "We have said several times that we will not listen to a party who complains of a grievance which is not his."

Again, in *Smiley* v. *Kansas*, 196 U. S. 447, this Court held, l. c. 457:

> "He cannot be heard to object to the statute merely because it operates oppressively upon others. The hurt must be to himself. * * * Hence, unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint. This is fundamental and decisively settled."

The resolution under which the petitioner attempted to intervene makes it plain that the reason for its intervention was the damage resulting to persons engaged on the market and to the owners of property. The pertinent portion of the resolution is:

> "Whereas, the proposed produce food terminal in Kansas City, Kansas, would merely divide the present market business, without increasing the number of consumers or the amount of shipments to or from Greater Kansas City or its trade territory, would greatly decrease property values and would be a wasteful duplication of existing market facilities and those now being constructed in Kansas City, Missouri, out of the bonds voted as aforesaid." (R. 10.)

Thus, if the petitioner is advocating the cause of the commission merchants whose business would be divided by a so-called "duplication" of market facilities and of the decrease in property value, petitioner would sustain no legal injury for the diminution in the produce business. That loss would fall upon the commission merchants. Likewise, petitioner would sustain no loss because of the decrease in property values. That loss would fall upon the property owners whose property had been diminished in value. In neither case could the petitioner redress the supposed wrongs done either the commission merchants or the property owners by the erection of the so-called duplicate market facilities. Those wrongs, if any there be, could be redressed only by those who had suffered legal injury.

Petitioner asserts in "5," *supra*, that if respondent is permitted to proceed with the construction of the alleged extension without securing a certificate of convenience and necessity from the Commission, that it will be in danger of losing a large amount of revenue from the

payment of taxes due to the fact that the property at and near the Kansas City, Missouri, market will depreciate in value, and many of the produce merchants will remove from Kansas City, Missouri, and carry on their business in the competing market. This ground affirmatively discloses no legal interest in petitioner. If, because of the removal of produce merchants from the Kansas City, Missouri, market to the Kansas City, Kansas, market, petitioner should sustain loss on account of diminution in tax revenues, the loss would not fall upon petitioner. Petitioner derives its support from taxes. If its income should be lessened for the reasons stated by it, then petitioner would be required to levy taxes in an amount sufficient to pay its operating expenses. Assuming, as petitioner contends, that its tax revenues would be decreased on account of the removal of its merchants and that, therefore, it would have to levy additional taxes to make up the deficiency, this burden would fall upon its citizens against whom the taxes are imposed and not upon petitioner. Again, petitioner is in the situation of advocating a supposed grievance of its citizens, which it clearly may not do unless expressly authorized by statute. If an anticipated loss of tax revenue would authorize the City to maintain this action, then the same anticipated loss would have justified the State of Oklahoma to maintain the suit in *State of Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co., supra.*

Another reason why petitioner may not invoke paragraphs 18 to 20 to redress alleged private wrongs done to its citizens because of alleged damages to them occasioned by competition or by increased taxes, is that paragraphs 18 to 20 neither expressly nor inferentially confer such a right. It was the purpose of Congress to promote and develop rail transportation by the enactment of para-

graphs 18 and 20. It did not have any purpose to correct any supposed evils that existed because of competition between cities in industrial pursuits or to create causes of action resulting where one community was developed at the expense of another. See respondent's brief in Case No. 34 (pp. 16-28 thereof).

It is therefore submitted that the petitioner has no right, under paragraphs 18 to 20, to complain of the construction of duplicate market facilities and tracks appurtenant thereto, under paragraphs 18 to 20 of Section 1 of the Transportation Act, because (a) the petitioner, assuming, *arguendo*, the existence of legal wrong done to its citizens, may not redress that wrong in this case; and (b) neither the petitioner nor the produce merchants have sustained any legal injury because neither the petitioner nor the produce merchants have any legal immunity from competition alleged to be brought about by the construction of the market in Kansas City, Kansas; and (c) the diminution in tax revenues, which the petitioner will sustain by reason of the removal of the produce merchants to the Kansas City, Kansas, market, constitutes no actionable legal injury to petitioner for the reason that the increased tax burden occasioned thereby will not fall upon the petitioner, but upon the other citizens of the community, whose cause petitioner cannot maintain.

Petitioner has no right to intervene because of its desire to protect the public interest.

In its motion to intervene and in its proposed intervening petition, the petitioner alleges that its intervention in this cause is necessary to protect the public interest for the following reasons:

(1) There is no public or *quasi* public body with any interest in the subject matter which could adequately represent petitioner as a party in this suit (R. 9).

(2) That it is necessary for petitioner "to intervene to protect the public interests of its residents and in order that the process of this Court shall not unduly prejudice their interest". (R. 9).

(3) That "neither the Interstate Commerce Commission nor any Commission or relating [regulating] board of the state of Kansas or the state of Missouri has instituted any proceeding to compel the relief sought in this action * * *", (R. 17).

Petitioner is not one of the public agencies designated in paragraph 20 which is authorized to protect public interest. Congress entrusted this duty to the United States, the Interstate Commerce Commission, and the regulating bodies of any state or states affected. The protection of the public interest was considered to be adequately assured, by Congress, by its designation of the governmental and regulatory bodies therein named. Neither municipalities, other political subdivisions, nor any other public agency was given the right to act in the event the government or the other agencies named in the paragraph failed or refused to act. Therefore, the grounds for intervention asserted by petitioner that neither the Interstate Commerce Commission nor any regulating body of the States of Missouri or Kansas, nor any other public or *quasi* public body has acted, gives no ground to petitioner, under paragraphs 18 and 20, to act to protect the public interest. The following statement by this Court in *Botany Mills* v. *United States*, 278 U. S. 282, l. c. 289, is apt:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

We respectfully submit, for the foregoing reasons, that petitioner may not intervene for the protection of the public interest under paragraphs 18 and 20 on the grounds stated in its motion.

The cases cited by petitioner do not disclose the existence of any legal right.

The petitioner, as do the petitioners in L. Singer & Sons *et al.*, against this respondent, in Case No. 34 on the docket of this Court, relies strongly on *Western Pacific* v. *Southern Pacific Co.*, 284 U. S. 47. For the reasons given in respondent's brief in Case No. 34 (pp. 37-44 thereof), that the petitioners do not possess any legal right which is threatened or violated, we respectfully direct the attention of the Court to that brief to avoid repetition here.

It has never been held by any court that a city derived any legal right under the Transportation Act 1920 which would authorize it to secure an injunction against a carrier under the claim that a proposed extension of line would constitute an unlawful invasion of the territory of another carrier. No court, in any reported decision which we have been able to find, has held that a city acquired any legal right under paragraphs 18 and 20 of Section 1 of the Transportation Act 1920.

Petitioner cites *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, which, likewise, does not support petitioner, because that action was brought by a competing ferry company against the United States and the Interstate Commerce Commission before a specially constituted 3-judge court to enjoin the enforcement of an

order of the Commission authorizing a railroad company to establish and operate a ferry which it was asserted would invade the territory of the Ferry Company. There is certainly no analogy between the ferry company, engaged in the rendition of transportation services, whose territory was to be invaded by a competing railroad, to that of the petitioner in this case, which is not engaged in transportation and whose territory is not invaded.

Petitioner next cites *Atchison, etc., Ry. Co.* v. *Railroad Commission of California,* 283 U. S. 380, where the question was presented as to whether the Commission was authorized to issue a certificate under paragraph 18, except upon an application of the rail carriers. In that case the State of California and the city of Los Angeles were seeking to compel the railroads in the latter city to build a union passenger station, which involved an extension of their railroad, and, therefore, a certificate of convenience and necessity authorizing such extension. The carriers refused to file the application for the certificate. This Court held that either the state or the city had the right to file the application with the Commission. The question as to who was a party in interest under paragraph 20, to invoke the remedy by injunction, was in no way involved. This Court held that paragraphs 18 to 20 did not constitute any limitation upon the right of either a state or a city to apply to the Interstate Commerce Commission for a certificate of convenience and necessity authorizing a rail carrier to extend its line. In that case the state and city were attempting to exercise their admitted power to compel the maintenance of a union station. In this case the City seeks to assert the private rights of its private citizens and also to exercise power granted only to the United States and the public regulatory bodies.

Petitioner cites *Town of Inlet* v. *New York Central R. R. Co.*, 7 F. Supp. 781, which was an action brought under Sections 212-213 of the Judicial Code, as amended (Title 28, U. S. C. A., Section 45a), before a specially constituted 3-judge court to test the validity of an order authorizing the abandonment of a railroad. An examination of the opinion discloses that no question was raised or decided by the Court that the City could maintain the action. Petitioner's contention that the decision in that case is to be treated as decisive of the question of the existence of a legal right, under paragraphs 18 to 20, is similar to that rejected by this Court in *KVOS, Inc.*, v. *Associated Press*, 299 U. S. 269, where this Court held that the District Court did not have jurisdiction because the requisite jurisdictional amount was not involved. The Associated Press argued that the Court had taken jurisdiction in the case of *International News Service* v. *Associated Press*, 248 U. S. 215, and by so doing had held that the requisite jurisdictional amount was involved. In response to this contention, this Court said, l. c. 279:

> "But in that case the answer did not challenge the jurisdiction, there was no assignment of error raising the question and no argument on the subject was presented to the court. 'The most of that can be said is that the point was in the case if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'".

Thus, in *Town of Inlet* v. *New York Central Railroad, supra,* the question as to whether the plaintiff town was a party in interest was neither raised nor decided, as appears from the opinion. Other pertinent reasons why

this case does not support petitioner are (1) that the suit was brought by the Public Service Commission of the State of New York, which was admittedly a proper party in interest; (2) because the town, having been a party before the Interstate Commerce Commission, was expressly authorized by Sections 212-213 of the Judicial Code to become a party, and (3) no question was presented or decided as to whether a city was authorized, under paragraph 20 of Section 1, to institute a suit or intervene therein.

All of the other cases cited by petitioner and all of the statutes discussed in its brief have been argued by respondent in its brief in Case No. 34 (pp. 10-44 thereof).

Liberal construction of the statute contended for by petitioner.

The City claims that it is a party in interest, assigning as a reason therefor the nebulous argument that the act is highly remedial and must, therefore, be given a liberal construction. However, paragraph 20 of Section 1 is no more highly remedial than Section 45a which permits "any party or parties in interest to the proceeding before the commission" to appear as parties thereto "as of right" to contest or defend the validity of an order of the commission. Yet this Court has held in *Edward Hines Yellow Pine Trustees* v. *United States;* 263 U. S. 143, 148, that Section 45a did not authorize a lumber merchant to contest an order of the commission cancelling a penalty borne by the merchant's competitors although the cancellation of the charge may have subjected plaintiff to losses incident to more effective competition.

Petitioner claims that the Transportation Act was passed for the protection of those who pay the rates.

Those sections of the Act which require uniform rates and service were enacted for that purpose. But they were enacted to prevent railroads from playing into the hands of favored shippers by giving them advantages in rates and service which would enable them to more effectively stifle competition. In this case, petitioner claims that it may invoke the Transportation Act to enable it to stifle competition. This is the very thing that the Act seeks to prevent.

Petitioner claims that if respondent had made application to the commission for a certificate of public convenience and necessity it could have appeared in opposition to the application. Therefore, it is argued it may sue to enjoin the construction if no such application has been made.

Paragraph 19 of Section 1 provides that when an application for a certificate of public convenience and necessity is filed the commission shall publish notice in each county in or through which said line of railroad is constructed or operated. This is notice to the public in general and implies that anybody may be heard who is able to furnish the commission any information. However, paragraph 20 of Section 1 contains no such invitation to all the members of the public. It only grants the right to maintain a suit to enjoin the construction of the extension to "any party in interest." The fact that this restriction was omitted in paragraph 19 is due to the fact that the commission is an investigating body which may properly seek information wherever it is to be found, whereas the District Court is a judicial body which will not hear a complaint from one whose legal rights have not been invaded.

Petitioner claims that the wrong committed by respondent is not only the building of an unauthorized rail-

road extension, but also in joining with the city in building a market place. If the respondent acts *ultra vires* in building a market place, yet paragraph 20 offers no remedy therefor. Under that paragraph of Section 1 of the Transportation Act, no one may enjoin the building of a market place by a railroad company. The paragraph may only be invoked to enjoin the construction or operation of an unauthorized railroad extension.

A casual consideration of these arguments conclusively demonstrates that they constitute no reason why petitioner should have been permitted to intervene in this case. The ruling of the courts below denying such intervention was manifestly correct.

Conclusion.

Respondent respectfully submits that the decision of the Circuit Court of Appeals for the Eighth Circuit in this case should be affirmed because:

1. Petitioner has no unconditional right to intervene.

2. Petitioner's application to intervene as a plaintiff in this case was solely upon the ground that common questions of law and fact were involved in this case and in petitioner's alleged cause of action; therefore, the court's order denying intervention was an exercise of the court's discretion, it did not adjudicate any of plaintiff's rights, and it was not an appealable order.

3. No legal right was conferred upon petitioner by paragraphs 18 to 20 of Section 1 of the Transportation Act 1920 to be protected in its rents as a landlord of market stalls in Kansas City, Missouri.

4. No legal right was conferred upon petitioner by the paragraphs in question to protect the value of the market

in Kansas City, Missouri, to prevent competition by the market in Kansas City, Kansas.

5. Petitioner has no legal right to redress the alleged private wrongs done its citizens and, therefore, may not invoke such paragraphs of Section 1 of the Transportation Act 1920 for such purpose.

6. Petitioner has no right to intervene in this case because of its desire to protect the public interest. Neither has petitioner any redress on account of diminution of its tax revenues.

7. Petitioner, on the ground asserted in the complaint, may not complain of duplication of (a) railroad facilities; (b) diversion of traffic to respondent from other railroads; or (c) competition which will be brought about between respondent and other railroads by reason of the construction of the alleged extension, because these are all matters peculiarly within the concern of the public agencies designated in paragraph 20, or a competing railroad whose territory is to be invaded, and they are not of legal concern to petitioner.

8. The allegations of the petition to intervene and the proffered intervening petition affirmatively show that petitioner asserts no legal right conferred upon it by paragraphs 18 to 20 of Section 1 of the Transportation Act 1920, which has been or is about to be violated by respondent and, therefore, the principle of *damnum absque injuria* is applicable and petitioner therefore may not maintain the action.

It follows that petitioner does not come within the designation of "any party in interest," as that phrase was construed in *Edward Hines Yellow Pine Trustees* v.

United States, supra, and the other cases *supra,* and as used in paragraph 20 of Section 1 of the Transportation Act 1920, and that petitioner therefore may not maintain the purported cause of action alleged in the proffered complaint against respondent.

Respectfully submitted,

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Counsel for Respondent Union Pacific Railroad Company.

APPENDIX.

Paragraphs 18 and 20 of Section 1 of the Transportation Act 1920 are as follows:

"(18) *Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

"(20) *Issuance of certificate by commission; unlawful extension or abandonment of lines.* The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the

terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Mc Reynolds } 1,
Frankfurter } 1,
Stone } 1, 2, 7, 4,

SUPREME COURT OF THE UNITED STATES.

No. 34.—October Term, 1940.

L. Singer & Sons et al., Petitioners,
34 vs.
Union Pacific Railroad Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 16, 1940.]

Mr. Justice McReynolds delivered the opinion of the Court.

Undertaking to proceed under Paragraphs 18, 20 and 21, Section 402, Transportation Act, 1920[1] (41 Statutes 456, 477, U. S. C. Title 49, § 1) petitioners, by bill filed December 30, 1938, in the United States District Court, ~~Eastern~~ Western District of Missouri, asked a decree enjoining respondent from constructing or operating an alleged extension.

The bill describes them thus:—

"Plaintiffs are engaged in the business of buying and selling at wholesale and retail, fruits, vegetables and other food products within and adjacent to the so-called City Market of Kansas City, Missouri, located at and near the intersection of Fourth and Walnut Streets in said City, or are directly interested in or connected with said business. Said market has been in existence at said location for more than seventy-five years serving greater Kansas City and vicinity as a wholesale and retail produce market, and also serving numerous territories in other states to and from which perishable and other produce bought and sold in said market is transported. The City of Kansas City, Missouri, is now engaged in the

[1] Transportation Act, 1920, Sec. 402:

"Paragraph '(18) . . . no carrier by railroad subject to this Act shall undertake the extension of its line of railroad . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction . . . of such . . . extended line . . .' Paragraph '(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, . . .' Paragraph '(20) . . . Any construction . . . contrary to the provisions . . . of paragraph (18) . . . may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest. . . .'"

construction of new wholesale and retail market buildings and facilities in said vicinity at a cost of approximately 500,000.00. Said market is now and for a long period of time has been served by existing transportation facilities of various trunk line railroads, and said existing transportation facilities are suitable, convenient and adequate to meet the requirements of the market. The market is easily accessible to its customers through the facilities of said railroads and also by the use of streets and hard-surfaced highways radiating in every direction therefrom."

Answering, the respondent alleged that petitioners were not parties "in interest" within Paragraph 20, Sec. 402, Transportation Act and had no right to sue. The District Court sustained this defense and dismissed the bill. Upon appeal its action was affirmed. The matter is here by certiorari.

The Circuit Court of Appeals made the following summation of the bill—

"The complaint of the plaintiffs shows that they are commission merchants doing business on the Kansas City, Missouri, produce market, an old and well-established market which adequately serves the consuming public in its vicinity and receives produce from, and ships produce to, other states; that Kansas City, Missouri, is now engaged in constructing new market buildings for this market at at cost of about $500,000; that the market has suitable and adequate transportation facilities of all kinds; that the adjoining city of Kansas City, Kansas, proposes to build and is building a 'food Terminal' or produce market on a tract of land which it owns, at a cost of about $4,000,000, of which $1,710,000 is a grant from the Public Works Administration of the United States, and that the balance of the necessary funds will be procured by a sale of the City's bonds to the defendant railroad company; that the defendant proposes, at an expense of some $500,000, to furnish trackage to serve this Kansas City, Kansas, market; that this trackage constitutes an extension of the defendant's lines of railroad, for the construction of which it has procured no certificate of convenience and necessity from the Interstate Commerce Commission as required by law; that the construction and operation of the proposed extension in Kansas City, Kansas, will adversely affect and will destroy the business and properties of the plaintiffs and the large investments which they have made in and adjacent to the Kansas City, Missouri, produce market; that it will create an unnecessary and uncalled for rival market at an inconvenient place without creating any more produce to be handled or any more customers to be served; that it will result in the unnecessary duplication of railroad facilities at a cost of $500,000 without increasing the amount of freight to be handled; that it will divert traffic from other railroads which

are now adequately handling the traffic to the Kansas City, Missouri, produce market, and will cause destructive competition between the defendant and other railroads and will cause a wasteful and needless expenditure of money by the defendant; that 'for each and all of the reasons aforesaid, the construction and operation, or the construction, or the operation of the said extension or extensions of railroad by the defendant to said proposed produce market in Kansas City, Kansas, will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of plaintiffs and the public interest.'"

It is not alleged that the respondent has ever served the produce market in Kansas City, Missouri, or that petitioners make or receive shipments over its lines or that the proposed extension will deprive them of any shipping facilities. Evidently the real purpose was to obstruct construction of a competitor and the theory upon which the proceeding rests would permit petitioners to sue if any railroad should extend its lines to any market competing with the market at Kansas City, Missouri.

Concerning the purport of the allegations of the bill, the Circuit Court of Appeals rightly said:

"It is obvious that the only basis for the plaintiffs' claim that the alleged extension of the lines of the defendant to the Kansas City, Kansas, market will particularly injure them is that they do business upon the Kansas City, Missouri, market, and that if the proposed rival market in Kansas City, Kansas, functions, it will divert business from the market upon which they operate and will thus hurt them, their business, and their investments in Kansas City, Missouri, and that, since the proposed extension of its tracks by the defendant is necessary to enable the rival market to function, such extension will therefore injure the plaintiffs. It seems equally obvious that, except for the fact that the proposed extension is essential to the operation of the rival market in Kansas, it could not possibly have any direct or immediate effect upon the plaintiffs, their property or their business in Missouri, other than the effect which a wasteful expenditure by the defendant of its money would have upon the public generally. The proximate cause of the injury to the plaintiffs will be the competition created by the construction and operation of the rival market, and not the construction or operation of the transportation facilities furnished to it by the defendant or by others engaged in the transportation business."

It declared that the question whether petitioners were "parties in interest" within Paragraph 20 must be determined upon consideration of *Western Pacific* v. *Southern Pacific*, 284 U. S. 47, and concluded—

"The plaintiffs have no definite legal right which is threatened. They are, however, persons whose welfare may be adversely affected by the bringing about of a material change in the transportation situation, in the sense that the extension proposed by the defendant, if built and operated, will enable a competitive market to function to their detriment. In that sense, we think it may safely be said that the proposed extension of defendant's lines may adversely affect the plaintiffs' welfare. We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and consequentially, affected by the proposed extension. They are not in competition with the defendant. They are not engaged in the transportation business. Their only peculiar interest in that business is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiffs serve. . . . We conclude that the statute is not to be so liberally construed as to enable those who fear adverse effects upon their business from the establishment of competitive enterprises requiring transportation facilities, to maintain suits to enjoin railroads from constructing what are claimed to be unauthorized extensions to serve such enterprises."

A dissenting opinion by Judge Stone likewise relied upon *Western Pacific California Railroad Co.* v. *Southern Pacific Company*, but took the view that the challenged action might directly and substantially affect petitioners' welfare since their financial interests would suffer from the proposed rival market which could not come into existence without the proposed extension.

The purpose and effect of paragraphs 18, 20 and 21 were much considered in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266 and *Western Pacific California Railroad Co.* v. *Southern Pacific Company*, 284 U. S. 47.

In the first of these causes a railroad sought to prevent another from building an extension. The meaning of the term "party in interest" was not discussed. But the opinion asserts that by the Transportation Act of 1920, "Congress undertook to develop and maintain for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers

is a matter of national concern; that the property employed must be permited to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."

Also "the prohibition of Paragraph 18 is absolute. If the proposed track is an extension and no certificate has been obtained, the party in interest opposing construction is entitled as of right to an injunction."

In the second cause it was claimed that the Western Pacific was not "a party in interest" within the statute. The Circuit Court of Appeals accepted that view; we concluded otherwise but did not undertake to announce an inclusive and exclusive definition of the term. The circumstances disclosed a special interest in that complainant with probability of direct loss from what the defendant—not another—proposed to do. The portion of the opinion, presently specially important, follows—

"If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See *Massachusetts v. Mellon*, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation."

The Transportation Act, 1920, was designed to protect the public against action which might endanger its interest. In order to aid that general purpose, Paragraph 20, Section 402, provides that suit for an injunction may be instituted by the United States, the Commission (I. C. C.), any Commission or Regulative Body of the state or states affected, or any "party in interest." Such a suit cannot be instituted by an individual unless he "possesses something more than a common concern for obedience to law." The general or

common interest finds protection in the permission to sue granted to public authorities. An individual may have some special and peculiar interest which may be directly and materially affected by alleged unlawful action. See *Detroit & M. Ry.* v. *Bowne City, etc., & Co.*, 286 Fed. 540. If such circumstances are shown he may sue; he is then "party in interest" within the meaning of the statute. In the absence of these circumstances he is not such a party.

We cannot think Congress supposed that the development and maintenance of an adequate railway system would be aided by permitting any person engaged in business within or adjacent to a public market to demand an injuction against a carrier seeking only to serve a competing market by means of an extension not authorized by the Interstate Commerce Commission.

The right to sue under the statute is individual. Petitioners are not helped by uniting.

The Circuit Court of Appeals after reviewing all the facts reached the conclusion that the welfare of petitioners could only be indirectly and consequentially affected by the proposed extension; that their interest in the transportation situation "is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiff served." It held this was not enough. We agree. A mere extension to the plant of a competitor which in no other way affects the complaining parties in no proper sense brings about a material change in the transportation system directly affecting their peculiar interest which they have the right to prevent by suit.

The challenged judgment must be affirmed.

Kansas City, Mo. v. *L. Singer & Sons et al.*

No. 35.

The City of Kansas City, Missouri, sought to intervene in No. 34. The District Court denied its motion. The Circuit Court of Appeals affirmed. In view of what we have decided in No. 34 this denial necessarily must be affirmed.

SUPREME COURT OF THE UNITED STATES.

Nos. 34 and 35.—October Term, 1940.

34 L. Singer & Sons et al., Petitioners, *vs.* Union Pacific Railroad Company.

35 Kansas City, Missouri, Petitioner, *vs.* L. Singer & Sons et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 16, 1940.]

Mr. Justice Frankfurter, ~~concurring~~.

I quite agree with my Brother Stone that unfair loss may be cast upon a community by the unjustified extension of a railroad line, and that such loss is one consequence of the evils of unregulated railroad building which the Transportation Act was intended to check. But our immediate problem is to determine how a community can challenge such a proposed improper extension. Can a city, in other words, come into a Federal Court and urge its special relation to an alleged violation of § 1(18-22), of the Transportation Act, 1920, 41 Stat. 456, 477, 49 U. S. C. § 1(18-22)? The answer, of course, depends on the scheme of enforcement that Congress has devised for the Act. After making administrative provisions for securing a certificate from the Interstate Commerce Commission as a prerequisite to the construction of an "extension", the Act subjects any construction in violation of its licensing system to an injunction "at the suit of the United States, the Commission, any commission or regulating body of the State or States affected or any party in interest". § 1(20).

A city deeming itself adversely affected by a proposed illegal extension would naturally turn to its state commission to assert its interests. If, for any reason, the state agency does not employ its power under § 1(20) on behalf of the city's claims, the latter can invoke the law-enforcing authority of the Interstate Commerce Commission and also enlist the power of the Attorney General to initiate

litigation. It is reading § 1(20) without illumination of the scheme and purposes of the Transportation Act to expand the categories of public agencies explicitly named by Congress for enforcing § 1(18) by including a city as a "party in interest". To do so would disregard recognition of a state utility commission as the special repository of all the interests of a state in this particular field, and of the Interstate Commerce Commission as the national organ for enforcing the body of interstate commerce acts. Clearly, therefore, Kansas City can not be deemed a "party in interest" for the litigious purposes of that phrase in § 1(20).

But it would indeed be strange to find that while the city was not given power to resort to a court, a private and more limited sufferer from the same economic threat may have such legal standing. Such a paradox exposes the appropriate scope of "party in interest" in § 1(20). The guiding considerations in the application of that section are to be found in the reach of the functions of the Interstate Commerce Commission and of its state analogues. They are relied on for the enforcement of railroad legislation neither grudgingly nor with scepticism. In these agencies are lodged the resources for compounding the manifold ingredients of "the public interest". To entrust the vindication of this public interest to a private litigant professing a special stake in the public interest is to impinge on the responsibility of the public authorities designated by Congress. If there be insufficient assurance that unlawful railroad construction will be resisted by a state commission representing all the interests of a state that are affected, the Interstate Commerce Commission may be moved to enjoin illegality.

Who then is a "party in interest"? As a part of the very system through which the national policy is to be achieved, a railroad has been deemed by this Court a "party in interest" to effectuate the railroad policy introduced by the licensing system of the Transportation Act. *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266, 277; *Western Pacific* v. *Southern Pac. Co.*, 284 U. S. 47. And one who in a proceeding initiated before the Interstate Commerce Commission has been treated by it as a party to the litigation, cf. *Los Angeles Passenger Terminal*, 100 I. C. C. 421; 142 I. C. C. 489; *Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380, 393-94, may perhaps be deemed a "party in interest" in the further pursuit of claims before a court after adverse action by the

Commission. Compare *I. C. C.* v. *Oregon-Washington R. R.*, 288 U. S. 14, and *Commission* v. *Sanders Radio Station*, 309 U. S. 470. But to allow any private interest to thresh out the complicated questions that arise out of § 1(18-22)[1]—as, for instance, whether a proposed construction is an "extension" or a "spur", compare *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266—is to invite dislocation of the scheme which Congress has devised for the expert conduct of the litigation of such issues.[2] It also would put upon the district courts the task of drawing fine lines in determining when a private claim is so special that it may be set apart from the general public interest and give the claimant power to litigate a public controversy. These inquiries are so harassing and unprofitable as to be avoided, unless Congress has explicitly cast the duty upon the courts. Against any such implication, in the absence of rather plain language, the whole course of federal railroad legislation and the relation of the Interstate Commerce Commission to it admonishes. The interests of merely private concerns are amply protected even though they must be channelled through the Attorney General or the Interstate Commerce Commission or a state commission.

Therefore, the court below made proper dispositions of these cases.

Mr. Justice ROBERTS, Mr. Justice BLACK, Mr. Justice DOUGLAS, and Mr. Justice MURPHY having concurred in the Court's opinion, also join in these views.

[1] The fact that, in order to raise the bare legal question of petitioner's right to sue, the illegality of the proposed extension was conceded by the pleadings, does not touch the force of the argument.

[2] With reference to the present circumstances themselves, the Attorney General, at the request of the Interstate Commerce Commission, has chosen a different remedy to protect the public interest. See United States *v.* Union Pacific R. R., 32 F. Supp. 917.

SUPREME COURT OF THE UNITED STATES.

Nos. 34, 35.—October Term, 1940.

L. Singer & Sons et al., Petitioners, 34 *vs.* Union Pacific Railroad Company. Kansas City, Missouri, Petitioner, 35 *vs.* L. Singer & Sons et al.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 16, 1940.]

Mr. Justice Stone.

I think that the complainants, petitioners in No. 34, are proper parties to maintain this suit, that the decree should be reversed and, on the remand, the petition of Kansas City for intervention should be considered in light of that conclusion and of §§ 212 and 213 of the Judicial Code, 28 U. S. C. §45a and of Rule 24 of the Rules of Civil Procedure.

On the pleadings it stands conceded that the proposed extension of respondent's line is unauthorized and unlawful, and the sole question we have to decide is whether the interests of petitioners in maintaining this suit, as disclosed by their pleadings, satisfies the requirement of the statute which authorizes it to be brought by "any party in interest".

Section 1(18) of the Transportation Act of 1920, 41 Stat. 474, 477, 49 U. S. C. § 1(18), forbids the extension of its line by a railroad without a certificate of the Interstate Commerce Commission that "the present or future public convenience and necessity require or will require the construction of the extension". Similarly it prohibits the abandonment of any portion of a line of railroad without a like certificate permitting the abandonment. Section 1(19) requires the Commission to give notice of application for a certificate to the governor of the state in which the proposed extension is to be constructed and to publish the notice in each county through which the line of railroad is constructed or operated. By § 1(20)

the Commission is authorized to attach to its certificate "such conditions as in its judgment the public ~~interest and~~ convenience may require", and authorizes any court of competent jurisdiction to enjoin the prohibited construction or abandonment "at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest; . . ." By § 1(22) spur, industrial, side tracks and the like are excluded from the authority of the Commission and the railroad may build them without applying for a certificate.

The interest of petitioners in maintaining the suit as shown by the pleadings is derived from the injury to the public which, it is specifically alleged, will result from the proposed extension through the injury to the community in Kansas City, Missouri, and vicinity, of which community petitioners are a part and in which they are property owners, and the consequent injury alleged to affect them individually. The public injury, it is alleged, will be caused by (a) the loss or serious impairment in utility of the Kansas City public produce market and the destruction of serious diminution of values of property and business and of financial investments in and about the market, which will be brought about by the extension, through the creation of a rival market and the diversion of traffic to it at a point in Kansas City, Kansas, far removed from the center of population of Kansas City, Missouri, and to the inconvenience of the great majority of the citizens of both cities who are served by the existing market, which is adequate to the needs of the community; (b) by the unnecessary duplication of railroad facilities in the Kansas City district at large cost, with wasteful and needless expenditures by respondent and no increase in freight to be handled; and (c) by the diversion of traffic to respondent railroad from other railroads and destructive competition between the railroads operating in the vicinity.

Special injury is shown to complainants (petitioners in Nos. 34) by the allegations that they are owners of business property and investments in the existing market area and vicinity, and that their property will be reduced in value in consequence of the diversion of traffic to the rival market. The petitioner, Kansas City, Missouri, in intervention, in No. 35, alleges the like injury to the public which it represents and sets up specifically the threatened loss in value and utility of a large public market structure which it is now building at great cost, and the threatened loss to it of taxes through diminution in property values in the city.

The statute does not define the "parties in interest" whom it permits to sue to restrain an unauthorized extension. It cannot be assumed that the phrase is meaningless or that the statute should be read as though the words were omitted. Obviously the parties intended must have, as do petitioners, an interest in the outcome of the litigation other than the "common concern for obedience to law". See *Massachusetts* v. *Mellon*, 262 U. S. 447, 488. And as the language of the statute plainly indicates, and as we have held, they may be, as are petitioners, others than the public bodies named in the statute as appropriate plaintiffs. *Atchison Ry.* v. *Railroad Commission*, 283 U. S. 380, 393, 394. And they may maintain the suit although the injury which they allege is not strictly an actionable wrong independently of the paragraphs in question. *Western Pacific R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47.

The statute draws no distinction between direct and indirect injury as the test of plaintiff's interest. Nor is any reason advanced for saying that his interest is more significant because the injury which he suffers is labeled "direct" rather than "indirect." In any case that suffered by petitioners does not seem to be any the less direct than that which an extension may inflict upon a competing railroad which admittedly may sue to enjoin it. *Western Pacific California R. Co.* v. *Southern Pacific Co., supra;* cf. *Glaiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382. If the statute imposes any requirements other than those indicated by the phrase "party in interest", they must be implied from the purposes of the statute, its context, and from the reasons for permitting others than the public bodies named in it to bring the suit. Cf. *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 24. On the other hand if maintenance of the present suit by petitioners is consistent with those purposes and aids them and is in harmony with the reasons for allowing any party in interest to sue, the conclusion would seem inescapable that petitioners are proper plaintiffs.

It is not denied that the statutory language and the legislative history of the paragraphs in question require consideration by the Commission of the interests of cities, towns and communities which are adversely affected by a proposed extension of a line of railroad, in order to determine whether "public convenience and necessity" require the extension. The phrase "public convenience and necessity" has long been used to signify the final result of the balancing of the consequences which flow from the proposed

action to all those matters of public concern which are affected by it. Cf. *Chesapeake & O. Ry. Co.* v. *United States,* 283 U. S. 35, 42; *United States* v. *Lowden,* 308 U. S. 225. And we have held that in the administration of the cognate provision relating to abandonment of railroad lines the Commission must consider as a part of the public convenience and necessity the interests of local communities affected by the proposed abandonment. *Colorado* v. *United States,* 271 U. S. 153, 168. A community may suffer injury through the loss of railroad service and diversion of traffic resulting from the construction and operation of a railroad extension without any compensating public advantage which is comparable in kind and amount with injury sustained by the abandonment of a line of railroad. One as well as the other should receive the consideration of the Commission in determining whether it should grant or withhold a certificate. Such appears to be its settled practice on applications for a certificate authorizing extension.[1]

It is plain that the purpose of the statute is the protection of the public interest and that in the administration of its provisions by the Commission public interest is of paramount concern. That interest is primarily that railroad extensions, as the statute provides, shall not be built or operated without receiving the approval of the Commission, and that the Commission shall grant its permission only if the public convenience and necessity so require.

In determining who may bring the suit to restrain the proposed construction as provided by § 1(20), it is significant that the suit is

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[1] See Aroostook Valley R. R., Construction, 105 I. C. C. 643; Minnesota W. R. R. Co., Construction, 111 I. C. C. 377; Northern Oklahoma Rys., 111 I. C. C. 765; Construction of Piedmont & W Ry., 138 I. C. C. 363; Western Pacific Caledonia R. Co., 162 I. C. C. 5 And in balancing the public conveniences and necessities involved, that is to say the public interest in an adequate transportation system and the public interest in protecting local communities from undue injury from extensions of relatively small transportation importance, the Commission has sometimes found the inquiry to existing community interests persuasive ground for refusing the certificate. Construction by Aroostook Valley R. R., *supra;* Construction by Minnesota W. R. R. Co., *supra.*

The broad scope of the Commission's inquiry is evidenced by the questionnaire which applicants for an extension must answer. Among the data required is the nature of the population, the territory, the industries involved, the names and character of towns near to but not served by the extension. See *In the matter of Applications under Paragraphs (18) and (21), Inclusive, Section 1, of the Interstate Commerce Act for Certificates of Public Convenience and Necessity for the Construction or Extension of Lines of Railroad,* January 22, 1924. III-A Sharfman, The Interstate Commerce Commission, 333-335, 351.

brought to restrain an act which the statute declares unlawful, the construction of an extension without the certificate of the Commission, § 1(18), and that the functio of the court is not that of the Commission in granting or withholding a certificate. The only issue which can be litigated in such a suit, brought by a proper plaintiff, is whether in fact the proposed construction is of a spur or sidetrack, the only new trackage which a railroad may lawfully build without recourse to the Commission. It is an issue which is by paragraphs (18) and (22) of § 1 made a judicial, not an administrative question and involves no more complexities of litigation than many other cases which courts are called on daily to decide. In any case the issue is one which Congress directed to be litigated in a suit brought under § 1(20), and its complexity is unaffected by the particular plaintiff who brings the suit.

If the proposed construction is an extension the injunction must issue as of right, but its only effect is to compel the railroad before proceeding further to apply to the Commission for a certificate of public convenience and necessity which is the public purpose of the Act. *Texas & Pacific Ry.* v. *Gulf, etc. Ry.*, 270 U. S. 266, 273. The court is thus called on to decide no administrative issue which must be submitted to the Commission in advance of suit, and any decree which it may render involves no embarrassment to the Commission or otherwise in the administration of the Act. While the Commission itself may bring the suit, it is under no statutory duty to do so and its only other authority in the premises is to grant or withhold the certificate when applied for. One injured by an unauthorized extension and opposed to its construction, whether a state commission, a competing railroad or any other injured party, is not authorized to initiate any proceeding before the Commission and its only protection as of right from the consequences of the threatened public wrong is that afforded by suit authorized by § 1(20). See *Texas & Pacific Ry.* v. *Gulf, etc. Ry., supra*, 272-274.

In considering the scope of the application of the statute this Court has recognized that the public interest which the Commission is to protect includes the public interest in the maintenance of an adequate transportation system and that a railroad whose welfare, although not its legal right, is adversely affected by an unauthorized and therefore unlawful extension of the line of another is a "party in interest" entitled to maintain suit to enjoin the extension. *Western Pacific California R. Co.* v. *Southern Pacific Co.*,

supra; cf. *Claiborne-Annapolis Ferry Co.* v. *United States, supra.* And it has held that one other than a carrier (a municipality), who has "a proper interest in the subject matter", may institute a proceeding before the Interstate Commerce Commission under § 1, paragraphs 18 to 22, to obtain a certificate of public convenience, so as to enable a railroad to build an extension to a new station which a state commission has ordered it to build. *Atchison Ry.* v. *Railroad Commission, supra,* 393, 394. Compare *Detroit & M. Ry.* v. *Boyne City etc., & Co.,* 286 Fed. 540.

But it has never held, unless it has done so now, that the public concern in protecting large communities from destruction of their business and financial interests by diversion of traffic to rival communities by railroad extensions, is not included in that public convenience and necessity which the Commission must consider in granting or withholding a certificate; or that one not a railroad who is a member of a community adversely affected and whose own business or property interests are so adversely affected is not a "party in interest" within the meaning of the statute.

If the statute permits some protection through commission action of the public interest in the preservation of communities adversely affected by the construction of railroad extensions, no plausible reason has been advanced for saying that an individual member of such a community whose property or financial interests are adversely affected by the proposed unauthorized extension, and who would be a proper party to the proceeding before the Commission on application for a certificate,[2] is not a party in interest, entitled to bring suit quite as much as a competing railroad whose property interes.. are likewise affected. On the contrary, petitioners have a special and peculiar interest in preventing the unlawful extension and in securing, before the extension is built, such consideration of

[2] It is settled policy of the Interstate Commerce Act and related statutes to permit shippers, cities, commercial organizations and other interested parties to participate in proceedings before the Commission and in those before the courts where the application of the statute is involved. § 9, 24 Stat. 382, 49 U. S. C. § 9 permits any person "claiming to be damaged" by a carrier to make complaint to the Commission or to bring suit in a district court. Communities, shippers and associations may make complaint to the Commission under § 13(1), 49 U. S. C. § 13(1), 24 Stat. 383 as amended, 36 Stat. 550. See, United States *v.* Merchants and Manufacturers' Traffic Association, 242 U. S. 178. § 42 provides that in actions to stop rebates and concessions "all persons interested in or affected by the rate or regulation or practice" may be made parties. §§ 212 and 213 of the Judicial Code, 28 U. S. C. A. § 45a provides that "communities, associations, corporations, firms and individuals who are interested in the controversy or question" before the Commission or in any suit which may be brought under the Act may intervene.

the community interest as the Commission gives, and which can be insured only by resort to the suit authorized by § 1(20).

True, the statute is concerned with the protection of the public interest but in order that the public interest might not suffer, and that private injury might not be inflicted through a public wrong, the construction of an unlawful extension, Congress did not restrict the authority to bring suit to public agencies—the United States, the Commission or state commissions. Congress by providing that applications for certificates of convenience need not be made for local spur or side tracks, recognized that such constructions are too trivial to require a proceeding before the Commission. Instead it gave authority to bring the suit to private parties in interest, who because of the injury especially inflicted upon them through the adverse effect of the unlawful extension on the public, have a peculiar incentive to protect the public interest with which the statute is concerned, see *Saunders* v. *Federal Communications Comm'n.*, 309 U. S. 470, 477, and who by restraining an unauthorized "extension" insure the expert consideration by the Commission in the situation in which Congress required it.

Just as Congress gave authority to a railroad to sue to enjoin an unauthorized extension by its competitor in order to effect the railroad policy of the Act, it gave like authority to complainants to effect its public policy with respect to a community injuriously affected by an unlawful railroad extension. The statute gives no warrant for saying that the one may bring suit but that the other can only ask some public body to bring it and neither interferes with the functions which the Commission is authorized to perform and which, as we have seen, are distinct from those assigned to the court by § 1(20).

Maintenance of the suit by complainants is thus within the fair meaning of the words of the statute. It aids rather than obstructs the administration of the Act; it effectuates the public policy of the Act and is within the reason for permitting others than public agencies to bring the suit. They are "parties in interest" to which the statute refers.

Since the suit was properly brought the district court should entertain and decide the petition of Kansas City for intervention in the light of 28 U. S. C. § 45a and Rule 24 of the Rules of Civil Procedure.

The CHIEF Justice and Mr. Justice REED concur in this opinion.